No. 07-375

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

AL RABIEE and WILLIAM H. WHITEHEAD,

Appellants,

v.

CALLIE T. DIETZ,
in her official capacity as Director of the
Alabama Administrative Office of the Courts,

Appellee.

On Appeal From A Decision Of A Three-Judge District Court For The Northern District Of Alabama

APPELLEE'S MOTION TO AFFIRM OR DISMISS

WILLIAM M. BOWEN, JR.
Counsel of Record

J. MARK WHITE
WHITE ARNOLD ANDREWS & DOWD, P.C.
2025 Third Avenue North, Suite 600
Birmingham, Alabama 35203-5400
Telephone: (205) 323-1888

Counsel for Appellee Callie T. Dietz

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The question presented in this case is whether the director and administrative head of the Alabama Administrative Office of Courts may be compelled to either submit a state statute for judicial preclearance under Section 5 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973(c), or whether she may be compelled to enforce Ala. Code § 12-24-2 requiring the recusal/disqualification of a state judge in cases where the judge has received significant financial contributions from a party, attorney or individual connected with the case.

PARTIES TO THE PROCEEDING

Al Rabiee is an individual person, was one of the two plaintiffs in district court, and is one of the appellants on this appeal.

William H. Whitehead is an individual person, was one of the two plaintiffs in district court, and is one of the appellants on this appeal.

For purposes of clarity, Rabiee and Whitehead are referred to as "Rabiee" in this brief.

Callie T. Dietz ["Dietz"] is an individual person and Director of the Alabama Administrative Office of the Courts [the "AOC"]. She was the defendant in the district court and is the appellee on this appeal.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26 of the Rules of the Supreme Court appellee Dietz hereby states that neither she nor the Alabama Administrative Office of Courts has any parent company, and no public company owns 10% or more of its stock.

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OPINION BELOW

The memorandum opinion of the three-judge district court in *Al Rabiee, et al. v. Callie T. Dietz*, Case No. 2:07-CV-302, United States District Court for the Northern District of Alabama, Southern Division, entered June 8, 2007, ("Panel Opinion") is unreported. A copy of this opinion is contained in Appendix A of this brief.

STATEMENT OF JURISDICTION

The three-judge district court panel entered its Memorandum Opinion granting Dietz's Motion to Dismiss Rabiee's complaint for declaratory judgment on June 8, 2007. Rabiee filed a notice of appeal on June 22, 2007. This Court has jurisdiction pursuant to 42 U.S.C. § 1973c and 28 U.S.C. § 1253.

STATUTES INVOLVED

The federal and state statutes involved are set out in Rabiee's Jurisdictional Statement at pp. 1 through 12. The principal statute involved is Ala. Code § 12-24-1 and § 12-24-2:

Code of Alabama

Title 12. Courts.

Chapter 24. Disclosure of Campaign Contributions.

§ 12-24-1. Recusal of justice or judge due to campaign contributions.

The Legislature intends by this chapter to require the recusal of a justice or judge from hearing a case in which there may be an appearance of impropriety because as a candidate the justice or judge received a substantial contribution from a party to the case, including attorneys for the party, and all others described in subsection (b) of Section 12-24-2. This legislation in no way intends to suggest that any sitting justice or judge of this state would be less than fair and impartial in any case. It merely intends for all the parties to a case and the public be made aware of campaign contributions made to a justice or judge by parties in a case and others described in subsection (b) of Section 12-24-2.

§ 12-24-2. Filing by judges, justices, parties, and attorneys of disclosure statements concerning campaign contributions.

(a) Any justice or judge of an appellate or circuit court of this state shall file, at least two weeks prior to the commencement of his or her term of office, with the Secretary of State, a statement disclosing the names and addresses of campaign contributors and the amount of each contribution made to him or her in the election immediately preceding his or her new term in office. Contributions from political action committees may be accepted if the committee furnishes to the Secretary of

State according to existing law a list of names and addresses of contributors and an amount properly attributable to each contributor. When a justice or judge does not file this annual statement, the Secretary of State shall notify the Administrative Office of Courts and that office shall withhold further compensation to the justice or judge pending compliance with this section.

(b) The Supreme Court shall provide under the appropriate rules of court, a rule or rules which provide as follows: In an appellate court proceeding the attorneys for all parties shall serve certificates of disclosure on all attorneys of record before such court within 28 days after the filing of the notice of appeal; or in a circuit court within 28 days after notice of the identity of the judge presiding on the case. Each certificate shall state the amount, if any, of campaign contributions by the respective individual donor or entity to any justice or judge of an appellate court where the case is pending, or if it is a trial court proceeding, the amount, if any, of campaign contributions by the respective individual donor or entity to the judge presiding over the case, made in the last election by the party or real parties in interest, any holder of five percent (5%) or more of a corporate party's stock, any employees of the party acting under that party's direction, any insurance carrier for the party which is potentially liable for the party's exposure in the case, the attorney for the party, other lawyers in practice with the attorney, and any

employees acting under the direction of the attorney or acting under the direction of those in practice with the attorney. The failure to file the certificates of disclosure within the time frames set out above shall not affect the validity of the filing but the court may impose sanctions provided for by Rule 37(b)(2)(C, D) of the Alabama Rules of Civil Procedure, for the failure of a party to comply with this section after being ordered to do so.

(c) The action shall be assigned to a justice or judge regardless of the information contained in the certificates of disclosure. If the action is assigned to a justice or judge of an appellate court who has received more than four thousand dollars ($4,000) based on the information set forth in any one certificate of disclosure, or to a circuit judge who has received more than two thousand dollars ($2,000) based on the information set out in any one certificate of disclosure, then, within 14 days after all parties have filed a certificate of disclosure, any party who has filed a certificate of disclosure setting out an amount including all amounts contributed by any person or entity designated in subsection (b), below the limit applicable to the justice or judge, or an amount above the applicable limit but less than that of any opposing party, shall file a written notice requiring recusal of the justice or judge or else such party shall be deemed to have waived such right to a recusal. Under no circumstances shall a justice or judge solicit a waiver of

recusal or participate in the action in any way when the justice or judge knows that the contributions of a party or its attorney exceed the applicable limit and there has been no waiver of recusal.

STATEMENT OF THE CASE

Rabiee seeks to compel Callie T. Dietz (Dietz) as director of the AOC to enforce a state statute requiring the recusal/disqualification of a state judge if that judge has received significant financial contributions from a party, attorney or individual connected with the case. Dietz is only the head of Alabama's Administrative Office of Courts ("AOC"). Neither she nor the AOC have any law enforcement or rule making authority under any statute or law.

On January 1, 1996, Alabama's judicial "Disclosure of Campaign Contributions" law became effective. *See* Acts 1995, No. 95-648, p. 1355, § 2(c)c codified as Ala. Code §§ 12-24-1 and -2 (the "Alabama Statute"). The Alabama Statute is designed to require the recusal of a judge from hearing a case in which the judge received a "substantial contribution" from a party, attorney or individual connected with the case. Ala. Code. § 12-24-1. The Statute requires, *inter alia*: (a) all Alabama state court judges to file with the Secretary of State annual public statements disclosing campaign contributions; (b) the Alabama Supreme Court to promulgate rules of court requiring attorneys to serve on all counsel of record in each case

certificates of disclosure stating the amount, if any, of campaign contributions made to the most recent election campaign of the presiding judge by all attorneys of record, any attorney with whom they practice, their clients, and related parties; and (c) upon the filing of a written notice of recusal, Alabama state court judges to recuse from any case in which the attorneys, their clients, or the related parties contributed over a certain amount of money to the judge's campaigns. *See* Ala. Code § 12-24-2. If a judge fails to file a campaign disclosure statement, the Alabama Secretary of State "shall notify the Administrative Office of Courts and that office shall withhold further compensation to the justice or judge pending compliance with this section." Ala. Code § 12-24-2(a).

The Alabama Statute has not been submitted or precleared by the Justice Department. Alabama is a "covered" state under Section 5 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973(c), and must obtain judicial "preclearance" before enacting or seeking to enforce "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . " 42 U.S.C. §§ 1973b, 1973(c)(a); *Lopez v. Monterey County, CA*, 519 U.S. 9, 12 (1996).

It is undisputed that the Alabama Statute has never been enforced. The Alabama Attorney General has never taken steps to enforce the Statute taking the position that the Statute does not require

preclearance.[1] The Alabama Supreme Court has never promulgated rules as required by the statute, having taken the position that, pursuant to Section 5 of the Voting Rights Act, the Statute is not legally enforceable until it has been precleared.[2] The Alabama Secretary of State has never notified AOC that a judge has failed to file an annual disclosure statement. The Alabama Administrative Office of Courts ("AOC") and its Director Dietz have likewise taken

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[1] The Department of Justice has taken the position that the Alabama Statute requires preclearance. In 1996 and 1997, two succeeding Alabama Attorney Generals (Jeff Sessions now U.S. Senator Sessions, and William Pryor now Judge Pryor of the U.S. Circuit Court of Appeals for the Eleventh Circuit) took the position that preclearance was not required because Section 5 was not involved. *See Presley v. Etowah, County Commission*, 502 U.S. 491, 510 (1992). Each refused to submit the Statute for preclearance.

[2] In *Rabiee v. Dietz*, Case No. 2:07-CV-302, N.D. Ala, June 8, 2007, the three-judge panel referred to *Ex parte McLeod*, 725 So.2d 271, 274 n. 3 (Ala. 1998) (noting that "preclearance of [the Statute] by the United States Justice Department is still pending" and stating that "it would be futile for this court to impose on judges a duty to disclose contributions when, upon the Justice Department's approval of the new statute, that duty will shift to the contributing parties."); *see also Finley v. Patterson*, 705 So.2d 834, 835 n. 1 (Ala. 1997) (Cook, J., specially concurring, noting that the enforcement of the Alabama Statutes "is in legal limbo" because there has been no resolution to the dispute between the Alabama Attorney General and the DOJ); *Bracking v. Trimmier Law Firm*, 897 So.2d 207, 233-34 (Ala. 2004) (Brown, J., denying a motion to recuse under the Alabama Statute, stating that because the Statute has not obtained preclearance, "it is questionable whether [it is] even enforceable," citing *Ex parte McLeod*, and *Finley*).

the position that the Alabama Statute requires preclearance under Section 5 of the VRA.

Rabiee had litigation pending in Alabama State Courts in which he filed motions to recuse based on allegations that the presiding judge(s) had received a "substantial contribution" from a party, attorney or individual connected with the case(s). Those recusal motions were denied at the state trial level. The Alabama Supreme Court denied relief on related petitions for writs of mandamus.

Rabiee contends that the failure or refusal to enforce the Alabama Statute is a violation of his right, and the rights of those similarly situated, under the Due Process Clause of the Fourteenth Amendment. Rabiee seeks to enforce Section 5 of the VRA. Initially, Rabiee filed an action in federal court in July of 2006, against the Governor Robert Riley and Attorney General Troy King on virtually identical grounds to those involved here. *Rabiee et al v. Riley et al.*, 2:06-cv-01395-RDP, (N.D. Ala. 2006), Memorandum Opinion and Order entered February 6, 2007. There a three-judge panel dismissed Rabiee's case without prejudice. In that case, Rabiee requested a declaratory judgment that the Alabama Statute did require preclearance. However, he abandoned that position in his trial brief, and argued that the Alabama Statute does not need to be precleared. Both the Alabama Attorney General and the Governor maintained their original position that the Alabama Statute did not require Section 5 preclearance. Because the position plaintiff Rabiee stated in his trial

brief was no different from that of the defendants, the panel determined that no "case" or "controversy" existed as is required for federal court jurisdiction under Article III of the United States Constitution. *See* U.S. Const. Art. III, § 2, cl. 1; *Elend v. Basham*, 471 F.3d 1199, 1204 (11th Cir. 2006). Likewise, the Declaratory Judgment Act applies only in cases involving an "actual controversy." 28 U.S.C. § 2201. Consequently, Rabiee's complaint was dismissed.

After the dismissal, Rabiee filed this civil action for declaratory judgment pursuant to 28 U.S.C. § 2201. This time Rabiee named Dietz in her official capacity as Director of the AOC as the only defendant. Rabiee asserted claims under Section 8 of the Voting Rights act, 42 U.S.C. § 1973c and the Due Process Clause of the Fourteenth Amendment in conjunction with 42 U.S.C. § 1983, maintaining that the Alabama Statute does not require preclearance. The three-judge panel again dismissed Rabiee's case finding that he had once again failed to meet the "case or controversy" requirement of Article III and the Declaratory Judgment Act.

In his second complaint, the one about which is the subject of this appeal, Rabiee sought alternative grounds of relief. If the Panel found that the Alabama Statute did not require preclearance, Rabiee requested a declaratory judgment to that effect and an injunction directing Dietz to enforce the Alabama Statute. In the alternative, and if the Panel decided that the Alabama Statute did require preclearance, Rabiee requested the Panel to "issue such orders as

are necessary to ensure that Alabama submits the Statutes for preclearance," pursuant to *Lopez v. Monterey County*, 519 U.S. 9, 23 (1996). Dietz moved to dismiss Rabiee's Complaint on the grounds that she was not a proper defendant because neither she nor the AOC has the authority to enforce the Alabama Statute.

The three-judge panel dismissed Rabiee's complaint on the ground that Rabiee had failed to establish standing as defined in *Hewitt v. Helms*, 482 U.S. 755, 761 (1987). Rabiee had failed to demonstrate: (a) that he had suffered an injury in fact, (b) that there was a causal connection between that injury and the challenged action of Dietz, and (c) that it must be likely, rather than merely speculative, that a favorable judgment would redress Rabiee's injury.

SUMMARY OF THE ARGUMENT

The federal district court panel correctly dismissed Rabiee's action for declaratory judgment and held that Rabiee had failed to demonstrate: (a) that he had suffered an injury in fact, (b) that there was a causal connection between that injury and the challenged action of Dietz, and (c) that it must be likely, rather than merely speculative, that a favorable judgment would redress Rabiee's injury.

ARGUMENT

On direct appeal from the decision of the three-judge panel to this Court, Rabiee argues that the panel's decision is "wrong" for two reasons. First, the panel erroneously denied Rabiee's standing because "that decision depends on the district court's erroneous analysis of Defendant's role in enforcing the Statutes." Rabiee's Jurisdictional Statement at 21. Rabiee argues that Dietz has a "duty to enforce the statute" because the AOC, like the Alabama Governor and Attorney General, has taken the position that the statute does not require preclearance. *Id.* This argument in no way overcomes the Panel's finding that the AOC has no obligation or authority to enforce this statute and has no obligation or authority to submit this statute for preclearance.

In these regards, the Panel found that the last sentence of Ala. Code § 12-24-2(a) does provide that "[w]hen a justice or judge does not file this annual statement, the Secretary of State shall notify the Administrative Office of Courts and that office shall withhold further compensation to the justice or judge pending compliance with this section." This is the only reference to the AOC contained in the entire statute.

> Plaintiffs would have the panel interpret this provision as giving the AOC the broad authority to enforce all provisions of the Statute. However, as Defendant points out, the AOC's duty to withhold a justice's or judge's

compensation is triggered only by notification from the Secretary of State of a justice's or judge's non-compliance with Subsection (a)'s disclosure requirements. The AOC is the proper agency for this duty, as it is responsible for the payment of justice's and judge's salaries. See Ala. Code § 12-5-13(b). The AOC may have a great deal of discretion with regard to expenditure of funds for the courts generally, however, under the Statute, it has no discretion. Its duty is purely ministerial. The Statute does not give the AOC discretion to determine whether a justice or judge has complied with the disclosure requirements set out in Subsection (a), or if that justice's or judge's compensation is to be suspended. The discretion to make those decisions is vested explicitly in the Secretary of State. The AOC's sole responsibility is, upon receiving information from the Secretary of State, to complete the paper work necessary to effect the withholding of a justice's or judge's compensation. Unless and until the Secretary of State performs its duties under the Statute, the AOC has no duty or authority thereunder whatsoever.

More importantly, Plaintiffs do not allege any injury caused by the nonenforcement of the disclosure requirements of Subsection (a). They have attempted to assert their rights under Subsection (c), which sets out the circumstances under which parties have the right to require the recusal of the justice or judge presiding over their case. The injury Plaintiffs allege as a result of the

non-enforcement of the Statute, is the denial of their motions for recusal of their state court judges.[3] Subsection (c) does not explicitly impose any responsibility for its enforcement upon the AOC, and Plaintiffs do not contend that it does.

Likewise, we are aware of no authority under which the AOC is charged with the duty of submitting a newly enacted law to the DOJ for preclearance under Section 5 of the VRA. Should the panel determine that the Alabama Statute does require preclearance, the remedy Plaintiffs request is for the court to "issue such orders as are necessary to ensure that Alabama submits the Statute[] for preclearance as expeditiously as possible . . . " (Doc. 1, Compl. at 14, ¶ 27.) As is apparent from the history of the Alabama Statute as summarized above, the submission of new statutes for preclearance under Section 5 of the VRA is the duty of the Attorney General of Alabama. Moreover, the determination of whether to submit a particular statute for preclearance is within his discretion.

Because Dietz is not the state official charged with the duty of enforcing the Statute or submitting the Statute for preclearance, any injury allegedly caused by the failure to do so is not "fairly traceable" to any

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[3] The traditional relief for the denial of a motion to recuse is a motion for a new trial under Ala. R. Civ. P. 59 or 60.

> action of Dietz or the AOC. Rather, any such injury is the result of inaction of third parties not before this panel: the Supreme Court of Alabama, the Alabama Secretary of State, and/or the Attorney General of Alabama. Injury suffered at the hands of these third parties, "is insufficient by itself to establish a case or controversy in the context of this suit," for neither has been named as a defendant. See Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41 (1976). Under the circumstances, Plaintiffs have failed to meet the causation prong of the standing analysis.

Panel Opinion at 15-16 (Rabiee's Jurisdictional Statement, Appendix A).

Second, Rabiee argues that the Panel also erred in concluding that any injury suffered was "caused by the Supreme Court of Alabama, the Alabama Secretary of State, and/or the Attorney General of Alabama" and not by the AOC. Rabiee's Jurisdictional Statement at 21 quoting from the Panel Opinion. This is the same argument as the first but merely worded in a different manner. The statute places no duty of enforcement or submission for preclearance upon the AOC. Panel Opinion at 12 (Rabiee's Jurisdictional Statement, Appendix A). Under the statute, the AOC's "sole responsibility is, upon receiving information from the Secretary of State, to complete the paper work necessary to effect the withholding of a justice's or judge's compensation. Unless and until the Secretary of State performs its duties under the

Statute, the AOC has no duty or authority thereunder whatsoever." Panel Opinion at 15 (Rabiee's Jurisdictional Statement, Appendix A).

CONCLUSION

Rabiee has argued nothing which was not considered by the Panel. He merely disagrees with the Panel's reasoning and Opinion without the citation of any authority to the contrary and without stating that the Panel overlooked or misapprehended a point of law or fact and then explaining why this is so. This appeal is wholly insubstantial and devoid of merit. Rabiee's appeal is frivolous in that it not only lacks merit but in that the claim is also "'without a plausible legal or factual basis and lacking in justification.' *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223, 226-27 (7th Cir. 1984)." *Amlong & Amlong, P.A. v. Denny's, Inc.*, No. 04-14499, 2006 WL 4758983 (11th Cir., September 17, 2006). For these reasons, this appeal is due to be dismissed and/or the judgment of the Panel affirmed.

Respectfully submitted,

WILLIAM M. BOWEN, JR.
Counsel of Record
J. MARK WHITE
Attorneys for Callie T. Dietz

APPENDIX A

Al Rabiee, et al. v. Callie T. Dietz, Case No. 2:07-CV-302, United States District Court for the Northern District of Alabama, Southern Division, three-judge panel memorandum opinion, June 8, 2007.

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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

AL RABIEE, et al.,	**CASE NO.:**
Plaintiffs,	**2:07-CV-302-VEH**
v.	**GERALD BARD TJOFLAT U.S. Circuit Judge**
CALLIE T. DIETZ, in her official capacity as Director of the Alabama Administrative Office of Courts,	**SHARON LOVELACE BLACKBURN U.S. Chief District Judge**
Defendant.	**VIRGINIA EMERSON HOPKINS U.S. District Judge**

MEMORANDUM OPINION

PER CURIUM:

This case is currently before the court on the Motion to Dismiss filed by defendant Callie T. Dietz

("Dietz"). (Doc. 13.)[1] Upon consideration of the record, the submissions of the parties, and the relevant law, the panel is of the opinion that the Motion is due to be granted.

I. INTRODUCTION

Plaintiffs Al Rabiee and William H. Whitehead initiated this declaratory judgment action pursuant to 28 U.S.C. § 2201, against Dietz, in her official capacity as Director of the Alabama Administrative Office of the Courts. Plaintiffs assert [PAGE 2] claims under Section 5 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973c, and under the Due Process Clause of the Fourteenth Amendment in conjunction with 42 U.S.C. § 1983.

Section 5 of the VRA governs changes in voting procedures, with the purpose of preventing jurisdictions covered by its requirements from enacting or seeking to administer voting changes that have a purpose or effect of denying or abridging the right to vote on account of race or color. *Lopez v. Monterey County, CA*, 519 U.S. 9, 12 (1996). Pursuant to Section 5, as a "covered jurisdiction," Alabama must obtain judicial preclearance from the United States District Court for the District of Columbia, or administrative preclearance from the United States

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[1] Reference to a document number, ["Doc. ___"], refers to the number assigned to each document as it is filed in the court's record.

Attorney General, before enacting or seeking to enforce "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . " 42 U.S.C. §§ 1973b, 1973c(a). "To obtain administrative preclearance of a new law affecting voting, a covered jurisdiction must submit the new law to the Attorney General of the United States. If the Attorney General does not object within 60 days of submission, the jurisdiction may enforce the legislation." Lopez, 519 U.S. at 12. Private citizens may bring suit to enforce Section 5, which "shall be heard and determined by a [district court] of three judges . . . " 42 U.S.C. § 1973c(a).

A. Summary of Plaintiffs' Claims

Plaintiffs' Complaint concerns an Alabama statute codified at Ala. Code §§ 12-24-1, 12-24-2 (the "Alabama Statute"), and contains four counts. Count One seeks appointment of a three-judge panel and declaratory judgment that the Alabama Statute does not require Section 5 preclearance. (Doc. 1, Compl. ¶ 25.) Count Two seeks injunctive relief under 42 U.S.C. § 1983 and the Due Process Clause of the Fourteenth Amendment requiring Dietz to enforce the statute. (Doc. 1, Compl. ¶ 26.) Counts Three and Four contain alternative remedies in the event that the panel concludes that the Statute does require

preclearance.[2] Count Three seeks declaratory judgment that the Statute requires Section 5 preclearance. (Doc. 1, Compl. ¶ 27.) Count Four requests the panel to issue any and all orders necessary to compel the state of Alabama to submit the statute for preclearance. (Doc. 1, Compl. ¶ 27.)

B. History of the Alabama Statute

The Alabama Statute was signed into law as Act No. 95-648, Ala. Acts 1995, on July 31, 1995; effective beginning with the first election after January 1, 1996. It was intended "to require the recusal of a justice or judge from hearing a case in which there may be an appearance of impropriety because as a candidate, the justice or judge received a substantial contribution" from a party in the case, attorneys for the party, or certain other individuals. Ala Code. § 12-24-1. Under the Statute, a contribution of more than four thousand dollars ($4,000) to the campaign of a justice or judge of an appellate court, or a contribution of more than two thousand dollars ($2,000) to the campaign of a circuit judge, is considered a "substantial contribution." See Ala. Code § 12-24-2(c). The Statute requires, inter alia: (1) all Alabama state court justices and judges to file with the Secretary of State annual public statements disclosing campaign

[2] The third and fourth counts in 2 Plaintiffs' Complaint are both labeled Count Three. The panel will assume that this is a mistake by Plaintiffs' counsel and will refer to the final count as Count Four.

contributions; (2) the Alabama Supreme Court to promulgate rules of court requiring attorneys to serve on all counsel of record in each case certificates of disclosure stating the amount, if any, of campaign contributions made to the most recent election campaign of the presiding justice or judge by all attorneys of record, any attorney with whom they practice, their clients, and related parties; and (3) upon the filing of a written notice of recusal, Alabama state court justices and judges to recuse from any case in which the attorneys, their clients, or the related parties contributed over a certain amount of money to the judge's campaigns. See Ala. Code § 12-24-2.

In March 1996, then Alabama Attorney General Jeff Sessions submitted the Alabama Statute to the United States Department of Justice ("DOJ") for preclearance under Section 5 of the Voting Rights Act. On May 13, 1996, the DOJ responded, [PAGE 5] requesting additional information from the Attorney General including, inter alia: the rule or rules adopted by the Alabama Supreme Court pursuant to the Statute; a list of each campaign contribution for each successful candidate for each Alabama justice and judge position since 1989; and a description of each instance since 1989 in which a party to litigation in the Alabama courts had sought recusal based on a judicial campaign contribution. The DOJ agreed that the Statute required preclearance, reasoning that the recusal provision triggered by the reporting requirements would result in lower individual campaign contributions to candidates for judicial election,

requiring candidates to seek contributions from a wider range of supporters. According to the DOJ, because of "societal discrimination," black candidates face greater obstacles in securing contributions from the public at large. Therefore, the DOJ concluded that enforcement of the Alabama Statute would make it more difficult for black candidates to run successful campaigns, thereby reducing the voting effectiveness of minority voters.

Attorney General Sessions responded on May 20, 1996, by withdrawing the Statute from submission, asserting that, after further review, his office had determined that it does not require preclearance because it does not "bear a direct relation on voting itself." The Alabama Attorney General's position relied on *Presley v. Etowah County Commission*, 502 U.S. 491, 510 (1992). The DOJ responded on July 23, [PAGE 6] 1996, expressing its disagreement with the Attorney General's reasoning, and requesting that the Statute be re-submitted for preclearance review. The Attorney General responded by letter dated July 30, 1996, stating, *inter alia*: "The State of Alabama will enforce Act No. 95-648, and the Attorney General of Alabama will not submit this law for preclearance. Section 5 does not apply. If you disagree, we respectfully suggest that you proceed to enforce your interpretation of Section 5 in this context." Almost one year later, in a letter to the Alabama Attorney General dated July 18, 1997, the DOJ again insisted that the Statute be submitted for preclearance. The DOJ requested that the Attorney General "inform us of the

action the State of Alabama plans to take concerning this matter." The new Alabama Attorney General, now Judge William Pryor, responded on July 23, 1997, by informing the DOJ that the Statutes would not be submitted for preclearance because, in his opinion, Section 5 does not apply. There is no record of further correspondence between the Alabama Attorney General and the DOJ regarding the preclearance of the Alabama Statute.

The Attorney General has never taken steps to enforce the Statute. Moreover, the Alabama Supreme Court has never promulgated rules as required by the statute, taking the position that, pursuant to Section 5 of the Voting Rights Act, the Statute is not legally enforceable until it has been precleared by the Attorney General or the [PAGE 7] United States District Court for the District of Columbia. On November 23, 1998, the Clerk of the Supreme Court of Alabama stated by letter to the judicial inquiry commission that "the official reason" for the Supreme Court's failure to adopt rules implementing Ala. Code § 12-24-2(b) was because "the Act had not been precleared by the Justice Department." The Alabama Supreme Court has also indicated its position, directly and indirectly, in several opinions. *Ex parte McLeod*, 725 So.2d 271, 274 n.3 (Ala. 1998) (noting that "preclearance of [the Statute] by the United States Justice Department is still pending" and stating that "it would be futile for this court to impose on judges a duty to disclose contributions when, upon the Justice Department's approval of the new statute, that duty

will shift to the contributing parties."); see also *Finley v. Patterson*, 705 So.2d 834, 835 n. 1 (Ala. 1997) (Cook, J., specially concurring, noting that the enforcement of the Alabama Statutes "is in legal limbo" because there has been no resolution to the dispute between the Alabama Attorney General and the DOJ); *Bracking v. Trimmier Law Firm*, 897 So. 2d 207, 233-34 (Ala. 2004) (Brown, J., denying a motion to recuse under the Alabama Statute, stating that because the Statute has not obtained preclearance, "it is questionable whether [it is] even enforceable," citing *Ex parte McLeod*, and *Finley*).

The Alabama Administrative Office of Courts ("AOC"), and presumably its Director, defendant Dietz, have likewise taken the position that the Alabama Statute [PAGE 8] requires preclearance under Section 5 of the VRA. On January 6, 1999, Frank W. Gregory, then-Director of the AOC, wrote a letter to the presiding circuit judge of Tuscaloosa County advising that, in light of the DOJ's position as stated in its July 18, 1997 letter, "our office will not take any further action for non compliance with [the Statute's] provision[s]." The AOC reiterated its position to other Alabama Circuit Judges in letters dated January 11, 1999, March 13, 2000, and June 8, 2000. It appears that the last correspondence on this issue was the AOC's June 8, 2000 letter.

Plaintiffs contend that the Statute was adopted for their use and benefit and the use and benefit of those similarly situated and, therefore, the failure or refusal to enforce the Alabama Statute is a violation

of their rights under the Due Process Clause of the Fourteenth Amendment. Both Plaintiffs are parties in litigation currently pending in Alabama state court.[3] Both have moved for the recusal of the presiding judges in their respective cases pursuant to the terms of the Alabama Statute. Plaintiffs contend that each judge has received campaign contributions from the opposing parties and/or the opposing parties' lawyers in amounts that would [PAGE 9] require recusal under Ala. Code. § 12-24-2(c). Their motions to recuse were denied. Both Plaintiffs filed petitions for a writ of mandamus to the Alabama Supreme Court. Plaintiff Whitehead also filed a motion to recuse all but one of the Justices of the Supreme Court on consideration of his petition on the ground that each had received campaign contributions from the opposing parties and/or the opposing parties' lawyers in amounts that would require the Justices' recusal under the Statute. The Supreme Court denied Whitehead's motion to recuse, as well as both Plaintiffs' petitions for mandamus.

C. Plaintiffs' Previous Action

Plaintiffs Rabiee and Whitehead filed a similar action in this court on July 20, 2006 against Governor

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[3] Plaintiffs' cases are styled: *William H. Whitehead v. Bradley, Arant, Rose & White, LLP, et al.*, CV-2005-6143 (Circuit Court of Jefferson County, Alabama; Hon. Tom King presiding); *Terry Slaughter v. Al Rabiee, et al.*, CV-2005-7674 (Circuit Court of Jefferson County, Alabama; Hon. Robert Vance, Jr. presiding).

Robert Riley and Attorney General Troy King on virtually identical grounds. CV-06-1395-RDP. A three-judge panel convened in that case included U.S. Circuit Judge Frank M. Hull, and U.S. District Judges David R. Proctor and Virginia Emerson Hopkins. In their complaint, Plaintiffs requested a declaratory judgment that Ala. Code §§ 12-24-1, 12-24-2 *do* require preclearance under Section 5 of the VRA. However, in their trial brief, Plaintiffs abandoned their original position, and argued that the Alabama Statute *does not* need to be precleared. As noted above, the Alabama Attorney General has maintained his position that the Alabama Statute does not require Section 5 preclearance. Governor Riley also took [PAGE 10] that position. Because the position Plaintiffs stated in their trial brief mirrored that of the defendants, the panel determined that no "case" or "controversy" existed as is required for federal court jurisdiction under Article III of the United States Constitution.[4] Plaintiffs' complaint was dismissed.

Plaintiffs filed this action against the Director of the AOC in her official capacity. Here, Plaintiffs have taken the position they eventually reached in their previous action, that the Alabama Statute does not

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[4] Article III of the Constitution re 4 stricts the jurisdiction of federal courts to actual "cases" or "controversies." U.S. Const. Art. III, § 2, cl. 1; *see Elend v. Basham*, 471 F.3d 1199, 1204 (11th Cir. 2006). Likewise, the Declaratory Judgment Act applies only in cases involving an "actual controversy." 28 U.S.C. § 2201.

require preclearance. Plaintiffs have thus avoided the particular Article III problem they faced in their former action, as the AOC's position on the issue of preclearance of the Alabama Statute is directly adverse to Plaintiffs' position. However, Plaintiffs again fail to meet the "case or controversy" requirement of Article III and the Declaratory Judgment Act.

II. DISCUSSION

Plaintiffs request relief in the form of two alternative schemes. Primarily, they seek a declaratory judgment that the Alabama Statute does *not* require preclearance, and they ask for an injunction under 42 U.S.C. § 1983 ordering Dietz to enforce the statutes. As an alternative, should the court declare that preclearance *is* required, [PAGE 11] Plaintiffs ask the court "to issue such orders as are necessary to ensure that Alabama submits the Statutes for preclearance," pursuant to *Lopez v. Monterey County*, 519 U.S. 9, 23 (1996) (holding that the goal of a three-judge panel facing a challenge under Section 5 must be to ensure that the covered jurisdiction submits the challenged legislation to the appropriate federal authorities for preclearance as expeditiously as possible). Dietz moves the court to dismiss Plaintiffs' Complaint on the grounds that she is not a proper defendant in this

action because neither she nor the AOC have the authority to enforce the Alabama Statute.[5]

Although the question of standing is not addressed in the parties' briefs, "the federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines." *United States v. Hays*, 515 U.S. 737, 742 (1995) (quoting FW/PBS, Inc. v. Dallas, 493 U.S. 215, 230-31 (1990) (internal quotations omitted; alterations in original)). Any plaintiff seeking to invoke a federal court's jurisdiction bears the burden of establishing standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "If a plaintiff lacks standing, the 'case' or 'controversy' requirement of Article III, § 2 of the U.S. Constitution is not satisfied, and the case must be dismissed." *Koziara v.* [PAGE 12] *City of Casselberry*, 392 F.3d 1302, 1304 (11th Cir. 2004). The "irreducible constitutional minimum of standing contains three elements." *Lujan*, 504 U.S. at 560. First, the plaintiff must be able to show that he has suffered an injury in fact – an invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not conjectural or hypothetical. *Id.* Second, there must be a causal connection between that injury and the challenged action of the defendant –

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[5] Defendant also contends that she is shielded from Plaintiffs' claims by Eleventh Amendment immunity. Because the panel finds that Plaintiffs' Complaint fails on the threshold issue of standing, it will not reach the issue of Dietz's immunity.

the injury must be "fairly traceable" to the defendant, and not the result of the independent action of some third party. *Id.* Finally, it must be likely, rather than merely speculative, that a favorable judgment will redress the plaintiff's injury. *Id.* at 561.

Plaintiffs' alleged injury is the denial of their right under Ala. Code § 12-24-2(c) to require the recusal of their presiding Alabama circuit judges, each of whom Plaintiffs allege received more than $2,000 from Plaintiffs' opposing parties and/or the opposing parties' lawyers. Plaintiff Whitehead also alleges the denial of his right to require the recusal of certain justices of the Alabama Supreme Court on consideration of his petition for writ of mandamus, each of whom Plaintiffs allege have received more than $4,000 from Plaintiff Whitehead's opposing party and/or the opposing party's lawyers. The actions Plaintiffs challenge, therefore, appear to be the denial of their motions to recuse by the Alabama circuit judges and certain justices [PAGE 13] of the Alabama Supreme Court which, in turn, was caused by one of two things. If the Statute does not require preclearance, the injury was caused by the failure to enforce the Statute; however, if the Statute does require preclearance, the injury was caused by the failure to submit the Statute for preclearance so that it could then be enforced. For the purposes of the standing inquiry, the panel will assume, without deciding, that Plaintiffs have alleged an injury in fact. That injury however, is caused by factors independent of

Dietz, and thus cannot be redressed by declaratory or injunctive relief against her.

Under United States Supreme Court and Eleventh Circuit precedent, "when a plaintiff seeks a declaration of the unconstitutionality of a state statute and an injunction against its enforcement, a state officer, in order to be an appropriate defendant, must, at a minimum, have some connection with enforcement of the provision at issue." *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1248 (11th Cir. 1998); see also *American Civil Liberties Union v. The Florida Bar*, 999 F.2d 1486, 1490 (11th Cir. 1993) (when a plaintiff challenges the constitutionality of a rule of law, it is the state official designated to enforce that rule who is the proper defendant); *Diamond v. Charles*, 476 U.S. 54, 64 (1986). Although Plaintiffs in this case are not seeking a declaration as to the constitutionality of a state law, we believe that the above stated principal nonetheless applies. In order to be a proper defendant [PAGE 14] in this case, a state official must be charged with the duty of enforcing the Statute at issue, and/or with the duty of submitting new laws affecting voting rights to the DOJ for preclearance under Section 5 of the VRA. Unless Defendant Dietz has the requisite authority, this panel's determination of Plaintiffs' claims would amount to nothing more than an advisory opinion prohibited by Article III's case and controversy requirement. See *Church v. City of Huntsville*, 30 F.3d 1332, 1335 (11th Cir. 1994) (citing *Valley Forge Christian College v. Americans United for Separation of*

Church and State, 454 U.S. 464, 471-72 (1982)). We can find no Alabama law or rule of any kind bestowing upon the AOC the general authority to enforce any law or to submit new enactments for Section 5 preclearance. Plaintiffs contend that, in the last sentence of Subsection (a), the Alabama Statute explicitly imposes responsibility for its enforcement upon the AOC. The Alabama Statute provides, in pertinent part, as follows:

> (a) any justice or judge of an appellate or circuit court of this state shall file
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> . . . with the Secretary of State, a statement disclosing the names and addresses of campaign contributors and the amount of each contribution made to him or her in the election immediately preceding his or her new term in office
>
> . . . . When a justice or judge does not file this annual statement, the Secretary of State shall notify the Administrative Office of Courts and that office shall withhold further compensation to the justice or judge pending compliance with this section.
>
> (b) The Supreme Court [of Alabama] shall provide . . . a rule or rules . . . as follows: In an appellate court proceeding the attorneys for all parties [PAGE 15] shall serve certificates of disclosure on all attorneys of record . . . Each certificate shall state the amount, if any, of campaign contributions by the respective individual donor or entity to any justice or judge of an appellate court where the case

> is pending, or if it is a trial court proceeding, the amount, if any, of campaign contributions by the respective individual donor or entity to the judge presiding over the case . . . [T]he court may impose sanctions provided for by Rule 37(b)(2)(C), (D) of the Alabama Rules of Civil Procedure, for the failure of a party to comply with this section after being ordered to do so.
>
> (c) The action shall be assigned to a justice or judge regardless of the information contained in the certificates of disclosure. If the action assigned to a justice or judge of an appellate court who has received more than four thousand dollars ($4,000) based on the information set forth in any one certificate of disclosure, or to a circuit judge who has received more than two thousand dollars ($2,000) based on the information set out in any one certificate of disclosure, then, within 14 days after all parties have filed a certificate of disclosure, any party who has filed a certificate of disclosure setting out an amount . . . below the limit applicable to the justice or judge, or an amount above the applicable limit but less than that of any opposing party, shall file a written notice requiring recusal of the justice or judge, or else such party shall be deemed to have waived such right of recusal . . .

Ala. Code § 12-24-2 (emphasis added). The sentence to which Plaintiffs refer does impose an obligation upon the AOC to withhold compensation from justices and judges who have failed to comply with the

disclosure requirements set out in Subsection (a). Plaintiffs would have the panel interpret this provision as giving the AOC the broad authority to enforce all provisions of the Statute. However, as Defendant points out, the AOC's duty to withhold a justice's or judge's compensation [PAGE 16] non-compliance with Subsection (a)'s disclosure requirements. The AOC is the proper agency for this duty, as it is responsible for the payment of justice's and judge's salaries. See Ala. Code § 12-5-13(b). The AOC may have a great deal of discretion with regard to expenditure of funds for the courts generally, however, under the Statute, it has no discretion. Its duty is purely ministerial. The Statute does not give the AOC discretion to determine whether a justice or judge has complied with the disclosure requirements set out in Subsection (a), or if that justice's or judge's compensation is to be suspended. The discretion to make those decisions is vested explicitly in the Secretary of State. The AOC's sole responsibility is, upon receiving information from the Secretary of State, to complete the paper work necessary to effect the withholding of a justice's or judge's compensation. Unless and until the Secretary of State performs its duties under the Statute, the AOC has no duty or authority thereunder whatsoever.

More importantly, Plaintiffs do not allege any injury caused by the nonenforcement of the disclosure requirements of Subsection (a). They have attempted to assert their rights under Subsection (c), which sets out the circumstances under which parties have the right to require the recusal of the justice or judge

presiding over their case. The injury Plaintiffs allege as a result of the non-enforcement of the [PAGE 17] Statute, is the denial of their motions for recusal of their state court judges.[6] Subsection (c) does not explicitly impose any responsibility for its enforcement upon the AOC, and Plaintiffs do not contend that it does.

Likewise, we are aware of no authority under which the AOC is charged with the duty of submitting a newly enacted law to the DOJ for preclearance under Section 5 of the VRA. Should the panel determine that the Alabama Statute *does* require preclearance, the remedy Plaintiffs request is for the court to "issue such orders as are necessary to ensure that Alabama submits the Statute[] for preclearance as expeditiously as possible . . . " (Doc. 1, Compl. at 14, ¶ 27.) As is apparent from the history of the Alabama Statute as summarized above, the submission of new statutes for preclearance under Section 5 of the VRA is the duty of the Attorney General of Alabama. Moreover, the determination of whether to submit a particular statute for preclearance is within his discretion.

Because Dietz is not the state official charged with the duty of enforcing the Statute or submitting the Statute for preclearance, any injury allegedly caused by the failure to do so is not "fairly traceable"

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[6] The traditional relief for the denial of a motion to recuse is a motion for a new trial under Ala. R. Civ. P. 59 or 60.

to any action of Dietz or the AOC. Rather, any such injury is the result of inaction of third parties not before this panel: the [PAGE 18] Supreme Court of Alabama, the Alabama Secretary of State, and/or the Attorney General of Alabama. Injury suffered at the hands of these third parties, "is insufficient by itself to establish a case or controversy in the context of this suit," for neither has been named as a defendant. See *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976). Under the circumstances, Plaintiffs have failed to meet the causation prong of the standing analysis.

For much the same reasons as outlined above, Plaintiffs cannot meet the third component of the standing inquiry – redressability. The Supreme Court has explained redressability as follows: In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces – the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought through the court, but from the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement – what makes it a proper judicial resolution of a "case or controversy" rather than an advisory opinion – is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff. *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (emphasis in original). "Absent a redressable injury a judicial

determination of plaintiff's claim would amount to an advisory opinion prohibited by Article III's case and controversy requirement." *Church*, 30 F.3d at 1335. The alternative remedies Plaintiffs seek – an injunction [PAGE 19] requiring the enforcement of the Alabama Statute, or an appropriate order to ensure that Alabama submits the Statute for preclearance – cannot be redressed by the AOC because it does not have the power to take either action. No remedy handed down against the Dietz or AOC could abate Plaintiffs' alleged injury. Thus, Dietz is not a proper defendant to this matter, and no "case or controversy" within the scope of Article III exists. Dietz's Motion to Dismiss is due to be granted.

III. CONCLUSION

Based on the forgoing, the panel concludes that Defendant's Motion to Dismiss is due to be granted. An Order granting Dietz's Motion and dismissing Plaintiffs' case will be entered contemporaneously herewith.

DONE and ORDERED this the 8th day of June, 2007.

VIRGINIA EMERSON HOPKINS
United States District Judge